95-1724

NO._____

Supreme Court, U.S.
FILED
APR 19 1996
CLERK

IN THE

**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1995

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JON BARTON JACOB

Petitioner

versus

METROLASER, INC.

Cecil Hess, President

Respondent

---

**PETITION FOR WRIT OF CERTIORARI**

**TO THE**

**NEW MEXICO SUPREME COURT**

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# PETITION FOR WRIT OF CERTIORARI

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Jon Barton Jacob

c/o 8400 Menaul N.E., Suite A-145

Albuquerque, New Mexico PZ 87112

42pp

## QUESTION PRESENTED

1. What is the legal responsibility of a party to a contract when presented with an Internal Revenue Service Notice of Levy, and then given Notice that congressionally mandated procedures antecedent to a Levy notice had not been followed, including the lack of a valid assessment?

## LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties.

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## OPINIONS BELOW

The denial of Writ of Certiorari to the New Mexico Supreme Court appears as Appendix A (pg. 1a). The opinion of the New Mexico Court of Appeals appears as Appendix B (pg. 2a).

## JURISDICTION

The judgment of the New Mexico Supreme Court was entered on January 31st, 1996. This Courts jurisdiction is invoked under 28 U.S.C. Section 1257(a).

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

1. Article VI of the Constitution of the United States of America provides in pertinent part: This Constitution, and the Laws of the United States which shall be made in Pursuance thereof... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby.

2. 26 U.S.C. Section 6203. Method of Assessment. The assessment shall be made by recording the liability of the taxpayer in the office of the Secretary in accordance with rules or regulations prescribed by the Secretary. Upon request of the taxpayer, the Secretary shall furnish the taxpayer a copy of the record of assessment.

3. 26 C.F.R. 301.6203-1. Method of assessment. The district director and the director of the regional service center shall appoint one or more assessment officers. The district director shall also appoint assessment officers in a Service Center servicing his district. The assessment shall be made by an assessment officer

signing the summary record of assessment. The summary record, through supporting records, shall provide identification of the taxpayer, the character of the liability assessed, the taxable period, if applicable, and the amount of the assessment. The amount of the assessment shall, in the case of tax shown on a return by the taxpayer, be the amount so shown, and in all other cases the amount of the assessment shall be the amount shown on the supporting list or record. The date of the assessment is the date the summary record is signed by an assessment officer. If the taxpayer requests a copy of the record of assessment, he shall be furnished a copy of the pertinent parts of the assessment which set forth the name of the taxpayer, the date of the assessment, the character of the liability assessed, the taxable period, if applicable, and the amounts assessed.

## STATEMENT OF THE CASE

On or about May 6, 1993, Petitioner Jon Barton Jacob, entered into a consulting agreement with Respondent Metrolaser to provide mechanical engineering services. This bilateral contract contained no waivers which granted Respondent power of attorney over property due Petitioner, stated that no employment relationship was to be construed, and continued with minor changes until October, 1994.

On or about April 1, 1994, the Internal Revenue Service (IRS) served a Notice of Levy upon Respondent for some purported due and owing tax. On April 22, 1994, Petitioner gave Respondent Notice that no liability had been incurred which would give rise to claims against property due Petitioner, and that specific procedures mandated by Congress regarding assessment records, determination and demand notice, and levy had not been followed. It was specifically pointed out to Respondent that the congressionally mandated 26 U.S.C. 6203 and 26 C.F.R. 301.6203-1 summary record of assessment records, 26 C.F.R. 301.6212-1 determination notice and 26 C.F.R. 301.6303-1 demand notice were absent. Further, Respondent was given Notice of their legal responsibility in that anyone entering into an agreement with the government took the responsibility of having accurately ascertained that he who purports to act for the government stays within the bounds of their authority.

Respondent contacted the IRS on several occasions to discuss the Levy. IRS personnel responded by warning that failure to comply with the Levy would subject Respondent to personal liability for the Levy plus penalties pursuant to 26 U.S.C. Section 6332(d).

Respondent ultimately convertedr 100% of property due Petitioner, $55,950.00, for services performed under the terms of the contract to the IRS.

On January 19, 1996, Petitioner file a Trover of Conversion complaint for damages against Respondent. Summary judgment was granted to Respondent on March 30, 1995; Petitioner's motion for reconsideration filed on April 26, 1995, amended on May 16, 1995, denied by order dated July 21st, 1996; and notice of appeal filed on August 17th, 1996. Rule 11 sanctions imposed against Petitioner on September 11, 1995, with a notice of appeal filed on September 13th, 1996.

New Mexico appellate court issued a memorandum opinion on December 12th, 1996. Petitioner's application for Writ of Certiorari to the New Mexico Supreme Court was denied on January 31st, 1996.

Petitioner's federal questions were first raised in the following District Court proceedings: Motion in Opposition dated March 7th, 1995 (Appendix G pg. 25a); Amended Motion for Reconsideration dated May 16th, 1995 (Appendix F pg. 19a). Petitioners federal questions were reiterated in the New Mexico Appeilate Court's with Petitioner's Memorandum In Opposition To Summary Calendar Assignment dated November 13th, 1995 (Appendix E pg. 16a);

and in the Petition For Writ Of Certiorari dated January 2nd, 1996 (Appendix D pg. 15a).

District Courts' FINDING OF FACT AND CONCLUSIONS OF LAW CONCERNING MOTION FOR RULE 11 SANCTIONS is included as Appendix C (pg. 8a).

## REASONS FOR GRANTING WRIT

### A. NEW MEXICO COURTS HAVE DECIDED A FEDERAL QUESTION REGARDING THE VALIDITY OF AN ASSESSMENT IN CONFLICT WITH APPLICABLE FEDERAL LAW, FEDERAL COURTS OF APPEAL, AND OF THIS COURT.

The term 'assessment' has a technical meaning spelled out in 26 U.S.C. and that meaning is binding on the court as well as the government. C & R Investments, Inc. v. United States, 267 F.Supp 832 (1967). When 26 U.S.C. Section 6203 was before congress, the detailed discussions of the proposed section in both the House and Senate were substantially the same, Brafman v. United States, 384 F.2d 863 (5th Cir. 1967):

> This section is a substantial clarification of existing law. It provides that the assessments shall be made by recording the liability of the taxpayer in accordance with rules or regulations of the Secretary. This will permit recording of liability, and hence assessment, through machine operations or through any other modern procedure. The Secretary is directed to furnish to the taxpayer, upon request, a copy of the record of the assessment of that taxpayer's liability.
> H.Rep. No. 1337, 83d Cong., 2d Sess., 1954 U.S.Cong.

> & Adm.News p. 4552; see S.Rep. No. 6122, 83d Cong., 2d Sess., 1954 U.S.Cong. & Adm.News p. 5221.

Legislative regulations promulgated pursuant to this section, which have the force and effect of law, Anderson, Clayton & Co. v. United States, 562 F.2d 972 (5th Cir. 1977), have been held to represent a permissible interpretation of section 6203, and the courts are therefore bound to give it deference. Koff v. United States, 3 F.3d 1297 (9th Cir. 1993).

This complete assessment process has been succinctly stated as:

> An assessment of a tax constitutes a determination by the IRS that taxes are actually owing in a certain amount. Treasury regulations provide that assessments are made by assessment officers signing the summary record of assessment, which shows the identity of the taxpayer, the character of the liability assessed, the taxable period, and the amount of the assessment. 26 C.F.R. 301.6203-1. In order to be valid, the record of the assessment must be made in accordance with the regulations, and must be signed by the appropriate officer.
> Essex v. Vinal, 499 F.2d 226, 230 (8th Cir. 1974), cert. denied, 419 U.S. 1107 (1975).

The merits of the tax liability are not the issue; it is the foundation of the assessment itself that is the concern of the court. U.S. v. Schroeder, 900 F.2d 1144 (7th Cir. 1990). A 'naked' assessment without any foundation whatsoever cannot be used in the formulation of the assessment, United States v. Janis, 428 U.S. 433 (1976), and if the taxpayer shows that the amount assessed has no rational foundation upon which to stand, then the assessment is void *ab initio*, Weir v. U.S., 716 F.Supp 575

(N.D.Ala. 1989), the taxpayer owes nothing, *Schroeder* @ 1148, 1149, and any executions based thereon are invalid, Iannelli v. Long, 329 F.Supp. 1241 (W.D.Penn 1971).

New Mexico District Court did not in any manner acknowledge the applicable Federal law regarding the assessment process. New Mexico Appellate Court, without any law to substantiate its position, stated that:

> Plaintiff contends that the merits of the tax liability were not the issue, but rather the foundation of the assessment itself. He contends that if the assessment has no rational foundation, it is void and Metrolaser would not be immune from suit.
>
> Plaintiff is mistaken in believing that the issue in this case was the foundation of the assessment. If that were so, Plaintiff should have filed his suit against the IRS. Appendix B, pg. 5a.

New Mexico Appellate court is mistaken. In the absence of the congressionally mandated assessment, the IRS's legal status becomes that of any other third party claimant, and Respondent is not immune from suit when it converts property due Petitioner to anothers use. Further, 26 C.F.R. 301.6332-1(c) states:

> "Any person who mistakenly surrenders to the United States property or rights to property not properly subject to levy is not relieved from liability to a third party who owns the property."

This disregard for applicable Federal law is absolutely repugnant to Article VI of the United States Constitution, which mandates that State court judges are bound to follow applicable Federal law. This

Court should therefore review the unprecedented disregard of the New Mexico Courts for the applicable Federal law regarding assessments.

## B. NEW MEXICO COURTS HAVE DECIDED A FEDERAL QUESTION REGARDING RESPONDENT'S LEGAL DUTY IN CONFLICT WITH DECISIONS OF THIS COURT.

A 'legal duty' implies the existence of some relation of private duty by contract, and has been defined as an obligation arising from the contract which the law requires to be done. 28 C.J.S. "Duty" @ 597 (1941). Third parties have no enforceable contractual rights if there is no contract. Corbin On Contracts, One Vol. Ed. (1952), pg. 725. Nor does it matter if the third party is the government when it acts outside the scope of its authority. Anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority, Federal Crop Ins. v. Merril, 332 U.S. 380 @ 384 (1947), and acts of federal agents without delegated authority are void, Cudahy Packing Co. v. Holland, 315 U.S. 357 (1942); U.S. v. Giordano, 416 U.S. 505 (1974); United States v. Spain, 825 F.2d 1426 (10th Cir. 1987). Persons dealing with the government are charged with knowing government statutes, Bollow v. Federal Reserve Bank of San

Francisco, 650 F.2d 1093 @ 1100 (9th Cir. 1981), and regulations, and they assume the risk that government agents may exceed their authority and provide misinformation. Lavin v. Marsh, 644 F.2d 1378 @ 1383 (9th Cir. 1981).

New Mexico District court refused to acknowledge the existance of any legal duty on behalf of Respondent to ensure that the IRS stayed within the bounds of their authority. New Mexico Appellate court complete disregarded the numerous decisions of the Federal courts when it stated:

> Plaintiff contends that MetroLaser had a legal duty to ascertain that the IRS was acting within its authority and since it did not, Plaintiff was entitled to file his suit. Even if Plaintiff is correct as to MetroLaser's obligation, his contention fails as MetroLaser did, in fact, question whether it had to turn the money over to the IRS. It was only after several communications between MetroLaser and the IRS that MetroLaser turned over the money. Therefore, MetroLaser did investigate whether the IRS was acting within its authority. Moreover, there in nothing in the complaint indicating that the IRS was outside its authority and that MetroLaser failed to find that out.

Here, the mere act of communication with and threats by the IRS are construed to be the limits of responsibility, despite the clear language of reason enunciated by Federal courts to the contrary. This disregard is absolutely repugnant to Article VI of the United States Constitution, which mandates that State court judges are bound to follow applicable Federal law. The Court should therefore review the unprecedented disregard of the New Mexico Courts for the applicable Federal law regarding the legal duty of Respondent

when notified of antecedent procedural violations to a Notice of Levy.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

Jon Jacob

Jon Barton Jacob
c/o 8400 Menaul N.E. Suite A-145
Albuquerque New Mexico PZ 87112

April 16, 1996

Dated

## APPENDIX A

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO
**Wednesday, January 31, 1996**

**NO. 23,391**

**JON BARTON JACOB,**
Plaintiff-Petitioner,

vs.

**METROLASER, INC., and**
**CECIL HESS, President,**
Defendants-Respondents

**ORDER**

This matter coming on for consideration by the Court upon petition for writ of certiorari, and the Court having considered said petition and response, and being sufficiently advised;

NOW, THEREFORE, IT IS ORDERED that petition for writ of certiorari is **denied** in the Court of Appeal number **16716**.

ATTEST: A True Copy

KATHLEEN JO GIBSON

CLERK OF THE SUPREME COURT

## APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

**JON BARTON JACOB,**

Plaintiff-Appellant,

vs.

**METROLASER, INC., and CECIL HESS, President,**

Defendant-Appellees.

**APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY**

Burt Cosgrove, District Judge

Jon Barton Jacob — Pro Se
Albuquerque, New Mexico

Richard D. Yoemans
RaMona G. Bootes
Guebert & Yoemans, P.C.
Albuquerque, New Mexico — Attorneys for Defendants-Appellees

MEMORANDUM OPINION

WECHSLER, Judge.

Plaintiff appeals several trial court orders resulting in the dismissal of his complaint and the award of Rule 11 sanctions. The calendar notice proposed summary affirmance. Plaintiff has timely responded with a memorandum in opposition, and Defendant has timely filed a memorandum in support. We affirm.

Timeliness of Appeal

In our calendar notice, we proposed to hold that Plaintiff had not timely filed his notice of appeal from the order granting summary judgment. We pointed out that the order granting summary judgment was filed on March 30, 1995. We noted, however, that a motion for reconsideration can extend the time for filing a notice of appeal. Plaintiff appears to be arguing that the motion he filed did not fall under the provisions of SCRA 1986, 12-201(D) (Repl. 1992). If that is so, there would have been no extension of time in which to file the notice of appeal, and it should have been filed no later than April 29, 1995. We believe, however, that the provisions of Rule 12-201(D) are applicable to the motion for reconsideration. See Village of Los Ranchos v. Shiveley, 110 N.M. 15, 17, 791 P.2d 466, 468 (Ct. App. 1989) (a motion for reconsideration is procedurally the same as a motion for new trial), cert. denied, 109 N.M. 704, 789 P.2d 1271 (1990)

Plaintiff appears to be arguing that SCRA 1986, 1-054(B) (Repl. 1992), governs the computation of the time for appeal in this case. Plaintiff is mistaken. Rule 1-054 is concerned only with the time requirements for the district court to file a judgment, requiring the court to file its judgment within sixty days after submission. This rule in no way governs when the notice of appeal is to be filed. The notice of appeal is filed only after the district court has entered its judgment. If the judgment has not been entered, there is nothing from which to appeal. Here, once the district court entered its order

granting summary judgment, Plaintiff had thirty days to file his notice of appeal. Insofar as Plaintiff may be arguing that the trial court had sixty days to rule on his motion for reconsideration, he is incorrect. There was already a final, appealable order in this case. The district court retains jurisdiction over a final order for thirty days in order to rule on motions directed against the judgment. NMSA 1978, Section 39-1-1 (Repl. Pamp. 1991). Once those thirty days have passed, undecided motions will be deemed denied and the trial court loses its jurisdiction. The summary judgment here was final. Plaintiff's motion for reconsideration does no take the case back to the beginning, as though nothing had happened. Plaintiff's appeal from the order granting summary judgment was untimely filed. We will, therefore, not consider his issues that relate to that order.

Rule 11 Sanctions

Plaintiff continues to argue that the trial court erred in applying sanctions under SCRA 1986, 1-011 (Repl. 1992), to him. As stated in the calendar notice, the reason for Rule 1-011 is to deter baseless filings in district court. We proposed to affirm the trial court's findings and conclusion that Plaintiff filed a complaint with no basis. We pointed out that Plaintiff's complaint did not state that Defendant had turned over the property pursuant to an IRS levy and was, therefore, immune from suit. Plaintiff contends that the merits of the tax liability were not the issue, but rather the

foundation of the assessment itself. He contends that if the assessment has no rational foundation, it is void and MetroLaser would not be immune from suit.

Plaintiff is mistaken in believing that the issue in this case was the foundation of the assessment. If that were so, Plaintiff should have filed his suit against the IRS. Here, the issue raised by Plaintiff;s lawsuit was whether MetroLaser improperly turned over property belonging to him. There is nothing in Plaintiff's complaint indicating the fact that the property was turned over to the IRS pursuant to a levy.

Plaintiff contends that MetroLaser had a legal duty to ascertain that the IRS was acting within its authority and since it did not, Plaintiff was entitled to file his suit. Even if Plaintiff is correct as to MetroLaser's obligation, his contention fails as MetroLaser did, in fact, question whether it had to turn the money over to the IRS. It was only after several communications between MetroLaser and the IRS that MetroLaser turned over the money. Therefore, MetroLaser did investigate whether the IRS was acting within its authority. Moreover, there in nothing in the complaint indicating that the IRS was outside its authority and that MetroLaser failed to find that out.

Plaintiff also argues that both this Court and the trial court erred in relying on an unpublished opinion from the federal district court in support of the finding of "no good ground." Plaintiff is

mistaken in his belief that an unpublished opinion may never be used in another case. It may not be relied on as legal precedent. However, it may be used as evidence on an issue of fact. Here, the opinion was used to show that Plaintiff had been involved in other such frivolous lawsuits, that Plaintiff knew there was no basis for his lawsuit, and that the lawsuit was filed without good ground. The trial court properly considered the opinion.

Jury Trial

Plaintiff continues to argue that he was entitled to a jury trial on the issue of Rule 1-011 sanctions. We know of no authority allowing a jury trial in such a case. Plaintiff contends that he is entitled to a jury trial as a matter of constitutional law, since he was being deprived of property without due process of law. The constitutional right to a jury trial entitles one to a jury trial only if the right existed in New Mexico immediately preceding adoption of the constitution. N.M. Const. art. II, Sec. 12; State ex rel. Human Servs. Dep't v. Aguirre, 110 N.M. 528, 797 P.2d 317 (Ct. App. 1990). Neither Rule 1-011 sanctions nor anything similar existed at the time of the adoption of the New Mexico Constitution. Therefore, there is no constitutional right to a jury trial. Further, the right to a jury trial does not come into play unless there is a lawsuit. Otero v. Zouhar, 102 N.M. 493, 502, 697 P.2d 493, 502 (Ct. App. 1984), rev'd on other grounds, 102 N.M. 482, 697 P.2d 482 (1985). Awarding sanctions for a Rule 1-011 violation is not a lawsuit.

We do not understand Plaintiff's arguments about practicing law and appearing pro se. We agree that he is entitled to appear to represent himself in a case. We do not see how that affects his purported right to a jury trial

Further, we note that Plaintiff filed his request for a jury trial after the trial court had ruled on the motion for sanctions. The request was untimely and could be denied for that reason. See SCRA 1986, 1-038(A) (Repl. 1992).

For the reasons stated herein and in the calendar notice, we affirm.

IT IS SO ORDERED.

/s/

JAMES J. WECHSLER, Judge

WE CONCUR:

/s/

LYNN PICKARD, Judge

/s/

BENNY E. FLORES, Judge

## APPENDIX C

SECOND JUDICIAL DISTRICT COURT
COUNTY OF BERNALILLO
STATE OF NEW MEXICO

JACOB, JON BARTON,
Plaintiff,

vs. No. CV 95-366

METROLASER, INC., et al.,
Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW
CONCERNING MOTION FOR RULE 11 SANCTIONS

The Court makes the following Findings of Fact and Conclusions of Law after Trial on the Merits; a hearing was also held on the matter of Rule 11 Sanctions. The Court reviewed the parties' requested Findings and Conclusions. All requested Findings of Fact and Conclusions of Law inconsistent with those made by the Court are refused.

Conclusions of Law contained in the "Findings" section are specifically incorporated as a part of the Court's Conclusion of Law. Similarly, all Findings of Fact contained in the "Conclusions" section are specifically incorporated as a part of the Court's Findings of Fact.

FINDINGS OF FACT

1. This Court has jurisdiction over the subject matter and over the parties.

2. Plaintiff Jon Barton Jacob ("Mr. Jacob") is a resident of Albuquerque, New Mexico.

3. Defendant MetroLaser, Inc. ("MetroLaser") is a California company. Defendant Dr. Cecil Hess is a resident of California and is the President of MetroLaser.

4. Plaintiff's Complaint for Damages seeks to recover monies paid by Defendant MetroLaser to the Internal Revenue Service ("IRS") pursuant to a Notice of Levy served on MetroLaser.

5. Mr. Jacob and MetroLaser entered into a consulting agreement on or about May 6, 1993.

6. Mr. Jacob advised MetroLaser and Cecil Hess that he would be personally responsible for all federal, state and local taxes, as well as social security taxes.

7. MetroLaser was served with a Notice of Levy by the IRS on or about April 1, 1994. The Notice of Levy stated that Plaintiff Jacob was delinquent in payment of federal income taxes for the years 1985, 1986, 1987, 1988 and 1989, and had unpaid tax assessments, plus penalties and interest, in the total amount of $148,843.92.

8. The Notice of Levy directed MetroLaser to "turn over to [the IRS] property and rights to property (such as money, credits, and bank deposits) that you have or which you are already obligated to pay [Mr. Jacob]."

9. The Notice of Levy was sent to Mr. Jacob. MetroLaser also notified Mr. Jacob of its receipt of the Notice of Levy.

10. Dr. Hess contacted the IRS and told them he was concerned about paying monies earned by Mr. Jacob to the IRS. The IRS advised Dr. Hess that if MetroLaser did not comply with the Notice of Levy, MetroLaser would face liability under the applicable statute, 26 U.S.C. Section 6332, and would also incur penalties under that statute.

11. Pursuant to the Notice of Levy, and 26 U.S.C. Section 6332, MetroLaser made payment to the IRS of monies in its possession which had been earned by Mr. Jacob. MetroLaser notified Mr. Jacob of each such payment it made to the IRS.

12. Mr. Jacob has been involved in other litigation disputing his obligation to pay taxes to the federal government. On August 2, 1993, Mr. Jacob filed suit against IRS agent Greg Illanes in the case captioned Jon Barton Jacob v. Greg Illanes, U.S. District Court for the District of New Mexico No. CV-93-916 JB ("the Illanes lawsuit"). Mr. Jacob alleged that Mr. Illanes lacked authority to issue certain third-party summonses during the course of Plaintiff's tax deficiency investigation. He sought relief 500 ounces of gold.

13. On December 21, 1993, The Honorable Juan Burciaga fined Mr. Jacob $5,000.00 for violation of Fed. R. Civ. P. 11. Judge Burciaga stated in his December 21, 1993 Memorandum Opinion and Order, "Plaintiff's Complaint is patently meritless."

15. Judge Burciaga also stated in his December 21, 1993 Memorandum Opinion and Order, "it appears reasonably certain to the Court that a small group of tax protesters, acting in concert, are filing frivolous complaints in this district. These tax protesters' nonsensical complaints waste valuable judicial resources and hinder the administration of the tax laws..." He also stated "[t]his Court must send a clear message to Plaintiff and to others also inclined to file similar frivolity: meritless complaints with absolutely no support in the law will not be tolerated in this district."

16. Judge Burciaga observed that by order dated July 1, 1992, the United States Tax Court imposed a penalty on Mr. Jacob of $15,000.00 for, inter alia, "instituting and maintaining these proceedings primarily for delay [and] for asserting and maintaining frivolous and groundless positions." Jacob v. Commissioner of Internal Revenue, No. 19460-90.

17. Mr. Jacob knew when he signed his Complaint for Damages that it was not warranted by existing law or a reasonable argument for its extension.

18. The amount of attorneys' fees and costs incurred by Defendants in defending against the claims in Plaintiff's Complaint for Damages, through the March 30, 1995 hearing on the Summary Judgment Motion and Motion for Sanctions, was $5,123.68. Additional attorneys' fees and costs have been incurred by Defendants due to Plaintiff's conduct, including appearances at

presentment order hearings on May 1, 1995 and July 21, 1995, and these attorneys' fees and costs were reasonably necessary, under the circumstances, for Defendants to defend against Plaintiff;s claims, and to pursue their lawful rights.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the subject matter and over the parties.

2. Plaintiff has willfully violated N.M. R. Civ. P. 1-011 by signing his Complaint for Damages, which Complaint for Damages has no good ground to support it.

3. A subjective good faith standard is properly applied when determining whether a litigant has violated N.M. R. Civ. P. 1-011. Rivera v. Brazos Lodge Corp., 111 N.M. 670, 808 P.2d 955 (1991).

4. There is no legal basis for Plaintiff's Complaint for Damages. 26 U.S.C. Section 6332(e) expressly provides that a party which surrenders property to the IRS pursuant to levy "shall be discharged from any obligation or liability to the delinquent taxpayer and any other person with respect to such property or rights to property arising from such surrender or payment."

5. Mr. Jacob knew when he signed his Complaint for Damages that there was no good ground to support it, having pursued other litigation challenging the authority of the IRS, and having been sanctioned by The Honorable Juan Burciaga in Jacob v. Illanes, U.S. District Court for the District of New Mexico No. CV-93-916 JB, and having been sanctioned by the United States Tax Court in Jacob v. Commissioner of Internal Revenue, No. 19460-90.

6. Imposition of sanctions against Plaintiff Jacob in this case is proper to deter future baseless filings in this Court.

7. Mr. Jacob has appeared in this action pro se. The Court strongly advised Mr. Jacob to consider retaining counsel. Nevertheless, Mr. Jacob appeared to the Court to be an intelligent, articulate individual who fully understood that his claims in this case were contrary to law.

8. Although pro se pleadings are held to less stringent standards than formal pleadings drafted by lawyers, the formality of Plaintiff's pleading has nothing to do with the legal deficiencies of the Complaint for Damages in this case.

9. An appropriate sanction against Mr. Jacob under the circumstances includes requiring that he pay to Defendants the amount of costs and attorneys' fees incurred by Defendants in defending against the frivolous claims in his Complaint for

Damages and Plaintiff's subsequent conduct. This serves to achieve the goals of N.M. R. Civ. P. 1-011 to deter baseless filings and to compensate parties for expenditure of time and resources responding to ill-founded pleadings.

10. Taking into account all of the foregoing, Mr. Jacob shall pay to Defendants MetroLaser, Inc., and Cecil Hess, President, the sum of $7,000.00, and judgment shall enter in favor of MetroLaser, Inc. and Cecil Hess and against Jon Barton Jacob in this amount.

## DECISION

An order should be entered reflecting these Findings and Conclusions.

/s/

Burt Cosgrove
District Judge, Division IX

BC:kw

## APPENDIX D

## EXCERPT FROM PLAINTIFF'S PETITION FOR WRIT OF CERTIORARI TO THE NEW MEXICO APPELLATE COURT DATED JANUARY 2, 1996

[4] QUESTION 2. Appellate courts Memorandum Opinion stated that the foundation of the assessment was not at issue. This is in direct conflict with U.S. v. Schroeder, 900 F.2d 1144 (7th Cir. 1990) which states that the merits of the tax liability are not the issue; it is the foundation of the assessment itself that is the concern of the court; with U.S. v. Janis, 428 U.S. 433 (1976), which states a 'naked' assessment without any foundation whatsoever cannot be used in the formulation of the assessment; with Weir v. U.S., 716 F.Supp 575 (N.D.Ala. 1989), which states that if the taxpayer shows that the amount assessed has no rational foundation upon which to stand, then the assessment is void *ab initio*; and with Iannelli v. Long, 329 F.Supp. 1241 (W.D.Penn 1971), which states that when applicable assessment procedures are not followed, the assessment is void and executions based thereon are invalid.

[5] Appellate court concludes that Metrolaser's contact with the IRS satisfied the requirement that the IRS was acting within the bounds of their authority. This is in direct conflict with Federal Crop Ins. v. Merril, 332 U.S. 380 @ 384 (1947), which states that anyone

entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority; with Cudahy Packing Co. v. Holland, 315 U.S. 357 (1942); U.S. v. Giordano, 416 U.S. 505 (1974); U.S. v. Spain, 825 F.2d 1426 (10th Cir. 1987), which state that acts of federal agents without delegated authority are void; with Bollow v. Federal Reserve Bank of San Francisco, 650 F.2d 1093 @ 1100 (9th Cir. 1981), which states that persons dealing with the government are charged with knowing government statutes and regulations; and with Lavin v. Marsh, 644 F.2d 1378 @ 1383 (9th Cir. 1981), which states that persons assume the risk that government agents may exceed their authority and provide misinformation.

## APPENDIX E

## EXCERPT FROM PLAINTIFF'S MEMORANDUM IN OPPOSITION TO SUMMARY CALENDAR ASSIGNMENT DATED NOVEMBER 13, 1995

[3] First, the Calendar Notice asserts "The complaint does not state that Defendant is immune from suit because the property was turned over pursuant to that levy." The merits of the tax liability are not the issue; it is the foundation of the assessment itself that is

the concern of the court. U.S. v. Schroeder, 900 F.2d 1144 (7th Cir. 1990). A 'naked' assessment without any foundation whatsoever cannot be used in the formulation of the assessment, U.S. v. Janis, 428 U.S. 433 (1976), and if the taxpayer shows that the amount assessed has no rational foundation upon which to stand, then the assessment is void ab initio, Weir v. U.S., 716 F.Supp 575 (N.D.Ala. 1989), the taxpayer owes nothing, *Schroeder* @ 1148, 1149, and any executions based thereon are invalid, Iannelli v. Long, 329 F.Supp. 1241 (W.D.Penn 1971). Here, the 'assessment' evidenced by the notice of levy has no rational foundation upon which to stand, subsequent claims and executions were invalid, and Metrolaser was not immune from liability. Metrolaser was given specific Notice of the procedural deficiencies antecedent to the levy notice, as well as their legal duty to ensure that such claims were valid.

Anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority. Federal Crop Ins. v. Merril, 332 U.S. 380 (1947). Persons dealing with the government are charged with knowing government statutes and regulations, Bollow v. Federal Reserve Bank of San Francisco, 650 F.2d 1093 (9th Cir. 1981), and they assume the risk that government agents may exceed their authority and provide misinformation. Lavin v. Marsh, 644 F.2d 1378 (9th Cir. 1981).

A 'legal duty' implies the existence of some relation of private duty by contract, and has been defined as an obligation arising from the contract which the law requires to be done. 28 C.J.S. [4] "Duty" @ 597 (1941), Thompson v. Occidental Life Ins. Co. of California, 90 N.M. 620, 567 P.2d 62, (N.M.App. 1977).

Once notified of the procedural deficiencies antecedent to the levy notice, absent any waiver, Defendant had a legal duty, arising out of the contract, to ensure that those who acted for the IRS stayed within the bounds of their authority. Metrolaser is legally charged with knowing the applicable statutes, especially when given Notice, and their failure to do so and act accordingly constitutes a breech of their legal duty to Jacob. New Mexico does not recognize the "right" to breech a contract and compel the other party to seek a remedy in the courts, State v. Ashley, 108 N.M. 343, 772 P.2d 377, (N.M.App. 1989).

## APPENDIX F

## EXCERPT FROM PLAINTIFF'S AMENDED MOTION FOR RECONSIDERATION DATED MAY 16, 1995

[6] Taxation consists of a three step process; (1) Assessment; (2) Levy; and (3) Collection.

> There is a marked difference between making a levy and the assessment of property for the purpose of taxation. A levy is merely fixing the subject and the amount at which property is to be taxed. As assessment consists in listing the property and putting a value thereon to which the rate fixed by the levy is to be applied.
> *City of Richmond v. Eubank* (1942), 18 S.E.2d 398, 403.

> [7] The term "assessment" as used in Internal Revenue Code contemplates the recordation of liability of a taxpayer by the Internal Revenue Service, and that meaning is binding on the federal courts and the government.
> *C & R Investments, Inc. v. U.S.*, 267 F.Supp, 932, 937.

Without an assessment, there can be no levy nor collection activities. To codify this step, Congress delegated to the Secretary the authority to prescribe the legislative regulations as follows:

> The assessment shall be made by recording the liability of the taxpayer in the office of the Secretary in accordance with rules or regulations prescribed by the Secretary. Upon request of the taxpayer, the Secretary shall furnish the taxpayer a copy of the record of the assessment.
> 26 U.S.C. Section 6203.

Table of Authorities (Plaintiff Exhibit F) list the rule-making authority as falling under 27 C.F.R. Part 70 (ALCOHOL, TOBACCO PRODUCTS AND FIREARMS, SUBCHAPTER F -PROCEDURES AND PRACTICES, Procedure and

Administration). Legislative regulation 26 C.F.R. 301.6201-1 (Plaintiff Exhibit J), which as explained above **has the force and effect of law**, states that the district director is only authorized to make assessments on (1) Taxes shown on return; (2) Unpaid taxes payable by stamp; and (3) Erroneous income tax prepayment credits. Under this authority, 26 C.F.R. 301.6203-1 Method of Assessment (Plaintiff Exhibit J) further provides "The assessment shall be made by an assessment officer signing the summary record of assessment. The summary record, through supporting records, shall provide identification of the taxpayer, the character of the liability assessed, the taxable period, if applicable, and the amount of the assessment. The amount of the assessment shall, in the case of tax shown on a return by the taxpayer, be the amount so shown, and in all other cases the amount of the assessment shall be the amount shown on the supporting list or record."

Internal Revenue Manual, Administration, Chapter 5300, 5312(1) states:

> The assessment is made by an assessment officer designated by the District Director or Service Center Director, as appropriate. The assessment officer signs a Summary Certificate of Assessment, Form 23C, and this record, through supporting data, provides identification of the taxpayer by name and number and the taxable period, the nature of the tax and the amount assessed.

Any assessment failing to comply with the recognized statutory regulations has been held to be invalid.

> The trial judge who held that the assessment was void against Coson because the taxes were never assessed to Coson, the record of assessment in the office of the Bureau making no reference whatever to Coson. The Government argues that there is no requirement that an assessment be made against any person. Although our decision as to the lack of proper notice or demand is [8] sufficient to dispose of the case, it would appear that the trial court was right in holding the assessment was insufficient for failure to comply with the statutory requirements.
> *United States v. Coson*, 286 F.2d 453

> The procedure for assessment provides, inter alia, that the assessment officer shall sign the summary record of assessments made against any taxpayer, that said action, through supporting records, shall provide identification of the taxpayer, the character of the liability assessed, the taxable period as applicable, and the amount of the assessment. The date of the assessment is the date the summary record is signed by an assessment officer. 26 USCA 6203 and 301.6203-1 of the Code of Federal Regulations. Since this procedure was not followed, the assessment is void and the executions based theron are invalid.
> *Ianalli v. Long*, 329 F.Supp. 1241

As the statutes, rules and regulations, and courts have clearly stated, **there MUST be an assessment**. This information was requested per 5 U.S.C. 552(a) from the the Regional FOIA officer, who stated on February 14, 1992 that there were no records of assessments, nor records of any Forms 23-C or supporting documents (Plaintiff Exhibit B). Similar requests per 5 U.S.C. 552(a) were made to the District FOIA officer, from which a reply dated October 25, 1994 was finally received from the Albuquerque District Director (Plaintiff Exhibit C), stating to the effect that the documents requested were available only through the regional center. If neither the regional or district IRS has this

Congressionally mandated summary record of assessment, then all collection activities have been done under the color of law without authority as applied to myself.

> [4] Defendant submitted a "Form 23C" which it asserts is a summary record of assessment. It is dated June 13, 1988, and was signed by an assessment officer. Other than the assessment officer's signature, it does not contain any of the Section 6203 or Section 301.6203-1 requirements. It does not identify the taxpayer, identify the character of the liability assessed, identify the tax period, or state the amount of the assessment. Defendant admits, "It is a summary of assessments made by one service center that have [been] posted to the Internal Revenue Service's main computer for one day. No individual assessment is shown on a 23C; it only shows totals for the service center for each class of tax." Therefore, unless the supporting records satisfy the statutory requirements, there is no evidence that the IRS made a valid assessment against Stallard for the tax period ended March 31, 1982, before the extended statute of limitations expired on December 31, 1990. *Stallard v. U.S.* (1992), 806 F.Supp 152, 158.

On or about April 25th, 1995, Defendant was given CONSTRUCTIVE NOTICE that no such assessment existed, and that "Should you wish to function as a tax collector for the government, please bear in mind that: Anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority."

...

> [9] It is perfectly obvious that third parties have no enforceable contractual rights if there is no contract. Like other plaintiffs, they have the burden of proving that a contract has been made. It is equally obvious that if such a contract has been proved and if they assert that under it

> they have a right to the rendition of some performance by the defendant, they must show that the defendant made a promise to render that performance.[10]
> *Corbin On Contracts*, One Volume Edition, West Publishing (1952), pg. 725.

As was clearly stated by the Court:

> Whatever the form in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority. The scope of this authority may be explicitly defined by Congress or be limited by delegated legislation, properly exercised through the rule-making power.
> *Federal Crop Ins. v. Merrill* (1947), 332 U.S. 381, 384.

Here, Defendant was given CONSTRUCTIVE NOTICE that no assessment had ever made by third party. "Since this procedure was not followed, the assessment is void and the executions based theron are invalid" (*Ianalli*). Further, Defendant was given CONSTRUCTIVE NOTICE of the fraudulent misrepresentations of authority and claims made by IRS personnel. Any reasonable person, especially one possessing a Ph.D., would have required further proof before converting property due Plaintiff to anothers use. Defendant has not disputed the fact that he had a legal obligation to ensure a valid contract exists, but mistakenly believes that this obligation ended through contacts and instructions from the IRS, not production of the evidence of liability. See AFFIDAVIT OF CECIL F. HESS, statement 5 - 9.

In the absence of an assessment or evidence of any third party contract, Defendant knew or should have known that he had a

further responsibility to ensure that claims against Plaintiff's property were valid. New Mexico statutes specify the procedure for in rem attachments, i.e. (1) grounds for attachment must be established; (2) a bond posted; (3) the complaint filed; and (4) notice be given to the defendant. In the absence of evidence that any of these procedures were followed, Plaintiff contends, and Defendant does not deny, that the rules applicable for minimum contacts should have been applied to establish jurisdiction over Plaintiff's property. Here again, the record is barren of any such proceeding by the Defendant.

Plaintiff cannot prove a negative, i.e. that the third party DOES NOT have an interest in his property. Any claimant upon Plaintiffs property must prove that they DO. And Defendant, in turning over Plaintiff's property, took "the risk of having ascertained that he who purport to act for the government stays within the bounds of his authority." Defendant has entered no evidence other than the unilateral activity of a third party, which has been consistently held by New Mexico and Federal Courts as simply insufficient to establish a jurisdictional nexus, much less a bilateral [11] contract. See Plaintiff's MOTION IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.

Defendant anticipated being haled into court (Defendant Attachment D), and cannot now rely upon third party hearsay as substitute for evidence to evade his legal obligation to Plaintiff.

## APPENDIX G

## EXCERPT FROM PLAINTIFF'S MOTION IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT DATED MARCH 7, 1995

[1] On or about May 6, 1993 and March 1, 1994, bilateral contracts were entered into with Defendant. The terms of these contracts did not convey power of attorney for any unilateral activity, nor did they contain any express or implied option to pay third parties, nor did they establish any legal [2] relation to any third party, nor did they contain any express or implied intention to establish a third party trustee relationship, nor did they establish any trust res in any third party trust. These contracts created a *vinculum juris*, or bond of law, whereby one party becomes or is bound to another to do something according to law.

It is perfectly obvious that third parties have no enforceable contractual rights if there is no contract. Like other plaintiffs, they have the burden of proving that a contract has been made. It is equally obvious that if such a contract has been proved and if they assert that under it they have a right to the rendition of some

performance by the defendant, they must show that the defendant made a promise to render that performance.

Thus, Defendant has certain legal responsibilities to ensure that any third party claims made against Plaintiff's property were valid.

> Whatever the form in which the Government [third party] functions, anyone entering into an arrangement with the Government [third party] takes the risk of having accurately ascertained that he who purports to act for the Government [third party] stays within the bounds of his authority.
> *Federal Crop Ins. v. Merril*, 332 U.S. 380 @ 384.
> (Bracketed comments added)

> **Authority.** Permission. Right to exercise powers; to implement and enforce laws.... Control over; jurisdiction.... The lawful delegation of power by one person to another. Power of agent to affect legal relations of principal by actions done in accordance with principal's manifestations of consent to agent.
> Black's Law Dictionary, Fifth Edition.

Defendant has failed in his legal responsibility to ensure that a contract exists between Plaintiff and any third party, that the jurisdictional minimum contacts required for due process with any third party have been met, that Plaintiff has expressly conveyed his rights to property to any third party, nor that Plaintiff has expressly entered into any legal relation with any third party.

Plaintiff denies any legally binding relationship with these third party claims being made against his property. See AFFIDAVIT OF JON BARTON JACOB. As such, MATERIAL UNDISPUTED FACTS numbered 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 of Defendant's motion are irrelevant.